In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-494

HARRY URBAN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioner filed a refund suit in the district court challenging the Commissioner of Internal Revenue's assessment of wagering taxes under Sections 4401(a) and 4411 of the Internal Revenue Code of 1954. While the petition alleges (p. 2) that the assessment was arbitrary and "not based on any reasonable fact basis," both the pretrial order and the findings of the district court (R. 87, 102) [1] recite that

[1] "R." references are to the appendix filed in the court of appeals.

there were no contested issues of fact and that the sole question presented by petitioner was the constitutionality of Sections 4401 and 4411, *supra*. Both the district court (Pet. App. A) and the court below (Pet. App. B) correctly rejected petitioner's contention as to the invalidity of the statute.

In support of his contention that the wagering tax statutes are unconstitutional, petitioner argues that to defend against the assessment he must testify and therefore incriminate himself; that it is inconsistent and irrational to collect a tax upon which no return need be filed; and that this Court's decisions in *Grosso* v. *United States*, 390 U.S. 62; *Marchetti* v. *United States*, 390 U.S. 39; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, support his contentions.

The court of appeals correctly held that *Grosso*, *Marchetti*, and *Coin & Currency*, *supra*, do not require reversal of the purely civil judgment involved in this case. This Court held in *Marchetti*, *Grosso*, and *Coin & Currency* merely that criminal punishment, or sanctions tantamount to criminal punishment (forfeiture), for non-compliance with these laws was inconsistent with the privilege against self-incrimination. In footnote 7 of the *Grosso* opinion (390 U.S. at 69-70), the Court carefully pointed out that it was not holding "that a proper claim of privilege extinguishes liability for taxation," but only that "such a claim of privilege precludes a criminal conviction." Likewise, in *Marchetti* (390 U.S. at 61) the Court emphasized—

> • • • that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

In *United States* v. *U.S. Coin & Currency, supra*, the Court reaffirmed its position in *Marchetti* and *Grosso* by stating that it "in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities" (401 U.S. at 717). Here, of course, unlike the situation in *Coin & Currency*, the government is seeking no forfeiture, but only to assess and collect taxes. All the other courts of appeals which have passed on the question have resolved the issue in the same way as did the court below. *E.g.*, *Hamilton* v. *United States*, 429 F.2d 427 (C.A. 2); *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *Cole* v. *Cardoza*, 441 F.2d 1337 (C.A. 6); *Collins* v. *Daly*, 437 F.2d 736, 739 (C.A. 7).

Petitioner argues that he can only defend the assessment by incriminating himself. The court below, however, found that the statute of limitations had run against any local gambling prosecutions and that any federal gambling prosecutions would be barred by the *Marchetti* and *Grosso* decisions, *supra*. Furthermore, if the petitioner, in defending against the assessment, were to disclose information alleged to be incriminating, the use of that information could be tested when and if its use in a criminal case is attempted. *United States* v. *Blue*, 384 U.S. 251.[3]

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[3] Petitioner's contention that the court below was confused as to the difference between taxes on income and the excise

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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taxes on wagering (Pet. 4) is without merit. The court below explicitly pointed out that it was deciding the constitutionality of the wagering tax statutes and not the constitutionality of an income tax on earnings derived from wagers.

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